

SERVICE DATE – MARCH 20, 2013

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 290 (Sub-No. 334X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT
EXEMPTION—IN CALHOUN COUNTY, ALA.

Decided: March 20, 2013

Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon approximately 1.81 miles of rail line extending between former Eastern Alabama Railway milepost LAM 508.08 (near the intersection of W. 10th and Pipe Streets) and milepost LAM 509.89 (to the east of the eastern end of W. 30th Street), in Anniston, Calhoun County, Ala. Notice of the exemption was served and published in the Federal Register on February 19, 2013 (78 Fed. Reg. 11,733). The exemption is scheduled to become effective on March 21, 2013.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) in this proceeding on February 22, 2013. In the EA, OEA stated that the U.S. Environmental Protection Agency (EPA) submitted comments indicating that the information submitted by NSR was insufficient to determine whether a permit under Section 402 of the Clean Water Act (33 U.S.C. § 1251) would be required for the proposed abandonment. EPA requested that NSR consult with the Alabama Department of Environmental Management (ADEM) regarding potential storm water concerns and the City of Anniston regarding the requirements of the Municipal Separate Storm Sewer System (MS4) program.

OEA also stated that ADEM submitted comments stating that its regulations require all construction and land disturbance projects to implement appropriate and effective Best Management Practices (BMPs) for the control of pollutants in storm water run-off, regardless of permit status or project size. Accordingly, OEA recommended that a condition be imposed requiring NSR to consult with ADEM regarding the implementation of BMPs and to comply with all reasonable requirements in order to prevent or mitigate any potential impacts to waterways.

OEA also pointed out NSR's statement that it received comments from USFWS indicating that no federally listed species would be affected by the proposed abandonment. OEA added, however, that it had not received a copy of the correspondence. Accordingly, OEA recommended that a condition be imposed requiring NSR to consult with USFWS regarding the potential impacts of the proposed abandonment on federally listed threatened or endangered

species prior to commencing salvage activities and to report the results of the consultations to OEA.¹

In addition, OEA stated that NSR served an historic report on the Alabama Historical Commission (SHPO) pursuant to 49 C.F.R. § 1105.8(c). The SHPO submitted comments stating that the proposed abandonment would not affect any known archaeological sites or historic properties listed in or eligible for inclusion in the National Register of Historic Places. The SHPO requested, however, that, should artifacts or archaeological features be encountered during salvage activities, NSR cease work and report to the SHPO immediately. OEA stated that it had reviewed the report and information provided by the SHPO and concurred with the SHPO's comments. Accordingly, OEA recommended that a condition be imposed requiring NSR to cease abandonment activities and report to the SHPO and OEA in the event that unanticipated archaeological sites or artifacts are discovered.

Comments to the EA were due March 11, 2013. OEA states in its final EA that NSR submitted comments clarifying that it has consulted with USFWS regarding the potential impact of the proposed abandonment on federally listed endangered or threatened species. NSR also submitted the results of the consultations to OEA, in which USFWS stated that no federally listed species or critical habitat are known to occur in the project area and that the abandonment as proposed would have no significant impact on fish and wildlife resources. Accordingly, OEA now recommends that the previously recommended condition requiring NSR to consult with USFWS prior to commencing abandonment activities not be imposed. Therefore, OEA states that only two of the previously recommended conditions (consultation with ADEM and the SHPO) should be imposed upon any decision granting abandonment authority. Accordingly, the conditions recommended by OEA will be imposed.

In the EA, OEA also stated that the right-of-way may be suitable for other public use following abandonment and salvage of the line. On February 21, 2013, the City of Anniston (proponent) filed a request for the issuance of a notice of interim trail use (NITU) to negotiate with NSR for acquisition of the line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. Pursuant to 49 C.F.R. § 1152.29, proponent has submitted a statement of its willingness to assume financial responsibility for the right-of-way, and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. By response filed on February 26, 2013, NSR has indicated its willingness to negotiate with proponent for interim trail use.

Because proponent's request complies with the requirements of 49 C.F.R. § 1152.29 and NSR is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h); Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012). If no

¹ OEA added that NSR could also submit any previous correspondence with USFWS, if it chose to do so.

agreement is reached within 180 days, NSR may fully abandon the line. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to any future use of the property for restoration of railroad operations.

Proponent also has requested imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. Proponent asks that NSR be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that NSR be barred from the removal or destruction of potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment authorization. Proponent's justification for its request is that these structures have considerable value for recreational trail purposes. Proponent states that the 180-day period is needed to assemble and review title information, complete a trail plan, and begin negotiations with NSR.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because proponent has satisfied these requirements, a 180-day public use condition will be imposed, requiring NSR to keep intact the right-of-way (including trail-related structures such as bridges, trestles, ballast, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from the March 21, 2013 effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition will expire on September 17, 2013, while the trail use negotiating period will run 180 days from the service date of this decision and notice until September 16, 2013. If a trail use agreement is reached on a portion of the right-of-way prior to September 16, 2013, NSR must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NSR is not required to deal exclusively with proponent, but may engage in negotiations with other interested persons.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on February 19, 2013, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit proponent to negotiate with NSR for trail use for the rail line, for a period of 180 days from the service date of this decision and notice until September 16, 2013 and to permit public use negotiations as set forth below, for a period of 180 days commencing from the March 21, 2013 effective date of the exemption, until September 17, 2013. The abandonment is also subject to the conditions that: (1)(a) prior to commencement of any salvage activities, NSR shall consult with ADEM regarding the implementation of appropriate and effective BMPs for the control of pollutants in storm water run-off and shall comply with all reasonable BMP requirements, and (b) NSR shall report the results of these consultations in writing to OEA prior to the onset of salvage operations; and (2)(a) in the event that any unanticipated archaeological sites or associated artifacts are discovered during salvage activities, NSR shall immediately cease all work and notify OEA and the SHPO pursuant to 36 C.F.R. § 800.13(b), and (b) OEA shall then consult with the SHPO, NSR, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.
3. The request for a NITU, under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 is granted.
4. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, NSR may discontinue service and salvage track and related materials. NSR shall otherwise keep intact the right-of-way underlying the tracks, including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days to enable any state or local government agency, or other interested person to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.
5. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.
6. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its financial responsibilities for the right-of-way.

7. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h).

8. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

9. If an agreement for interim trail use/rail banking is reached by September 16, 2013 for the right-of-way, interim trail use may be implemented. If no agreement is reached, NSR may fully abandon the line.

10. This decision and notice is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.